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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ADAM R. LOPEZ

D074786

on

Habeas Corpus.

ORIGINAL PROCEEDINGS on a petition for writ of habeas corpus seeking relief other than a release from custody. Petition granted.

John L. Staley, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Assistant Attorney General, Sara J. Romano and Brian C. Kinney, Deputy Attorneys General, for Respondent California Department of Corrections and Rehabilitation.

Petitioner Adam R. Lopez is a prisoner confined to the Centinela State Prison in Imperial County. After visiting with a friend in the prison's visitation room, Lopez was selected for a low-dose full-body x-ray scan, designed to detect contraband that might have been passed to him during the visitation. He refused, allegedly due to health

concerns. His refusal to be x-rayed resulted in a rule violation report, which he challenges in this habeas petition.

The Attorney General's brief spills significant ink extolling the efficacy and safety of low-dose x-ray scans as a tool for prison officials trying to interdict the flow of drugs, cell phones, and other prohibited items. We have no reason to doubt these claims. But the issue in this case is not whether prisons should—or even whether they can—use low-dose x-ray equipment to search prisoners. The question is instead whether the procedures utilized in this case, to which Lopez objected, are authorized by and consistent with existing regulations adopted by the California Department of Corrections and Rehabilitation (CDCR). To the contrary, however, the perhaps-outdated-but-straightforward regulations from the CDCR's Operations Manual provide that x-ray examination for contraband "shall be utilized only upon approval of a medical doctor and under the same medical requirements and precautions as apply to x-ray examinations for other medical reasons."

There is no dispute here that there was no approval by any medical doctor before Lopez was ordered to submit to an x-ray examination. If the CDCR wants to use low-level x-rays more broadly than current regulations permit—which may be a perfectly appropriate protocol—it must first follow established procedures to revise the current regulations. Having failed to do so, it cannot punish Lopez for refusing to comply with an order that was expressly unauthorized by the CDCR's own regulations.

FACTUAL AND PROCEDURAL BACKGROUND

Following a July 2017 visit with a friend in the Centinela Prison visitation room, Lopez was directed by a correctional officer to submit to a low-dose x-ray scan. He refused, allegedly due to health concerns. Instead he submitted to an unclothed body inspection. But his refusal to be x-rayed led to a rule violation report for disobeying an order from a correctional officer, resulting in (among other things) the loss of 30 days custody credits.

After exhausting his administrative remedies through the CDCR, Lopez filed a writ petition in the superior court challenging the finding of a rule violation. Relying on the CDCR's Operations Manual, he argued that the applicable regulations did not require him to submit to an x-ray scan. The court denied the petition, concluding that "the use of the Low Dose Full Body Scan is not a [*sic*] X-Ray Examination as the term is used in [the Operations Manual]." Lopez then filed a petition for writ of habeas corpus in this court.

DISCUSSION

Lopez was cited for disobeying a verbal order from a correctional officer. Title 15 of the California Code of Regulations, section 3005, subdivision (b) requires inmates of correctional institutions to "promptly and courteously obey written and verbal orders and instructions from department staff." Of course, implicit in the regulation is that the order from department staff is a legitimate one. (*Hardney v. Carey* (E.D.Cal., Mar. 31, 2011, No. CIV S-06-0300 LKK EFB P) 2011 U.S.Dist.Lexis 35603, at p. *3, fn. 2.) Here there is no dispute that Lopez refused to comply with an order issued by a correctional officer. Nor, for that matter, is there any question that Lopez's refusal was courteous. He simply

expressed his view that he was not required to submit to an x-ray for other than legitimate medical purposes, and agreed instead to undergo a strip search. He now contends that he cannot be disciplined—and in particular suffer the loss of custody credits—because he refused an x-ray examination that was not authorized by CDCR regulations and procedures.¹

A. *Lopez's Claim is Justiciable*

As a general rule, a prisoner's claim that he or she has been arbitrarily deprived of conduct credits is properly addressed on a petition for writ of habeas corpus. (*In re Rothwell* (2008) 164 Cal.App.4th 160, 165–166.) As a threshold matter here, however, the Attorney General suggests this court should recognize an exception to the general rule because Lopez is serving a life sentence and has long since passed his minimum eligible parole date. Accordingly, it is asserted, "Lopez did not truly lose credits based on the rule violation" and so the violation will have "no effect on Lopez's life sentence or the timing of his next parole hearing." As a result, reasons the Attorney General, Lopez does not present a justiciable claim for habeas relief.

¹ The CDCR suggests that Lopez is making two separate arguments: (1) a due process argument based on the alleged arbitrary imposition of discipline including the revocation of conduct credits; and (2) an argument that Centinela prison officials violated the Administrative Procedures Act (Gov. Code, § 11340 et seq.) because there is no regulation that authorizes discipline for failure to submit to a full-body x-ray scan. As to the latter argument only, the CDCR asserts that Lopez did not exhaust his administrative remedies. But we do not understand Lopez to be making two arguments. Rather he raises a single due process contention, contending he cannot be disciplined for his failure to submit to an x-ray scan that was unauthorized by current CDCR regulations.

We decline the invitation to craft a complicating exception to the general rule. It is the CDCR that decides whether to revoke conduct credits or instead impose a different type or level of discipline. To accept the Attorney General's argument would be to assume that the CDCR has engaged in a wholly superfluous act by selecting a form of discipline that can and will have no conceivable effect on Lopez. As we think that is highly unlikely, we instead endorse the administratively simpler proposition that an allegedly arbitrary loss of conduct credits can be addressed by means of a habeas writ, leaving the CDCR the option of withdrawing the proposed discipline and thereby mooting the petition if it so chooses.

B. *Current CDCR Regulations Do Not Authorize Mandatory Low-Dose X-Ray Scans Without Medical Approval*

In 2017 pursuant to a local operational procedure, Centinela Prison began using the Adani Low Dose Full Body Scanner to examine inmates suspected of concealing contraband. This local procedure provided that "[i]nmates participating in the Institution's visiting program . . . shall be required to pass through the Adani Low Dose Full Body Scanner upon the conclusion of their visit."

The CDCR's Operations Manual, pertinent portions of which the CDCR has submitted as part of the record, addresses searches of various types in the custodial setting. Operations Manual section 52050.21 of chapter 5, article 19, deals specifically with the use of x-ray examinations to detect contraband. It provides: "X-ray examinations for the purpose of confirming the ingestion of contraband or concealment of contraband in body cavities shall be utilized only upon approval of a medical doctor

and under the same medical requirements and precautions as apply to x-ray examinations for other medical reasons."

CDCR concedes it sought to employ a type of x-ray equipment to scan Lopez for contraband. It does not dispute the applicability of the Operations Manual or suggest that an individual prison facility can adopt procedures inconsistent with the manual. And it does not contend that any medical doctor approved the use of an x-ray scan on Lopez.

Instead it maintains that Operations Manual section 52050.21 "does not prohibit CDCR's use of body scan devices." In support of this assertion it argues that prison regulations incorporated in the Operations Manual are not designed to confer basic rights on inmates. The issue, however, is not whether Lopez has a "basic" right to refuse an x-ray, but whether CDCR can impose a disciplinary sanction for his refusal to obey an order that is facially inconsistent with its own regulation.

In suggesting that the order to Lopez was *not* inconsistent with Operations Manual section 52050.21, CDCR does not contest that Lopez was directed to submit to an x-ray examination. Indeed, the documents submitted by CDCR consistently refer to the device as an "x-ray scanner" or "x-ray screening system." And describing the alleged rule violation, the correctional officer explained, "I was . . . operating the Adani Low Dose Full Body Scanner X-Ray for the purpose of detecting contraband." Instead, CDCR represents that the pertinent portions of the manual were drafted more than 30 years ago, "decades before low-dose body-scan technology ever existed." So, the argument goes, when the drafters of Operations Manual section 52050.21 used the term "x-ray," they didn't mean *this* kind of x-ray.

But CDCR's Operations Manual section 52050.21 is not limited to a particular type of x-ray, and nothing in the existing language would support such a distinction in the proper context of interpreting the words of the regulation. If technology has advanced to a point where different kinds of x-rays require different rules, the solution is to amend the rules to acknowledge the differences, not to leave outdated rules in place. CDCR recognizes the proper approach when it cites to federal prison regulations that now "distinguish between medical x-rays and full-body x-ray scans." The problem here is that California prison regulations, drafted decades ago, do not make such a distinction.

Within broad limits, CDCR is the master of its own regulations and operational procedures. We do not doubt the importance of the need to use advanced technology to maintain the safety and security of our penal institutions. It is well within CDCR's purview to ensure that the language of its regulations keeps pace with that technology.² Until it does, prison officials cannot punish inmates for refusing to comply with orders not authorized by applicable CDCR regulations.

² We grant petitioner's unopposed request for judicial notice of a change in California Code of Regulations, title 15, section 3287 proposed by CDCR in September 2017 (three months after the incident underlying this petition) that would have added a subdivision (b)(6), providing that "[i]nmates shall be required to submit to contraband and/or metal detection devices . . . including, but not limited to, . . . low dose full body x-ray scanners" This new regulation has not yet been adopted.

DISPOSITION

Let a writ of habeas corpus issue directing the Department of Corrections and Rehabilitation to vacate its finding of a rule violation and restore the lost conduct credits. The order to show cause is discharged.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.